TAN CHUNG KAT, RE: EX P; CONTINENTAL TRADERS (SABAH) SDN. BHD.

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[BANKRUPTCY PETITION NO. K. 362 OF 1990]
13 MARCH 1991

BANKRUPTCY: *Bankruptcy notice - Service on wrong party - Whether Court has jurisdiction to order identification of judgment debtor by judgment creditor in Court - Address and name of debtor in affidavit of service and creditor's petition different - No dealings or transactions with judgment creditor - Signatures and NRIC number different - Bankruptcy Rules 1969, rr. 49, 91, 117, 276 - Rules of the High Court 1980, O. 14 r. 1(1) - Penal Code, ss. 191, 199.*

The judgment creditor C issued a bankruptcy notice to the judgment debtor D together with a copy of the final O. 14 judgment obtained against D by C. Evidence was adduced as to service of the notice on T. However, although T admitted that he was D, he (T) refused to acknowledge receipt of the petition. T then filed notice of intention to oppose on the ground that he was not the person named in C's petition and that he had had no dealings with C. T's Counsel produced evidence that the name of T in his NRIC did not correspond to the person named in the bankruptcy notice and petition.

Held:

[1] In the O. 14 judgment, the name and address of the debtor was stated as T T/A HYA and this was the same address stated in the affidavit of service of S dated 12 December 1989, However, in another affidavit of service of S dated 15 January 1991, the creditor's petition was served on HDA. There is no evidence that HYA and HDA are one and the same or that they are at the same premises.

[2] T's denial of having had any dealings or transactions with C at the material time and D's total unawareness of the alleged debt to C was held to be an important factor.

[3] There was no evidence to controvert the fact that the petition was served on the wrong party as it could not be proven that T was linked to the O. 14 proceedings on which the bankruptcy notice was grounded.

[4] The Court ordered for re-service of the notice on the proper party but held that if it is discovered that T was indeed D, police action should be taken against T for giving false evidence.

[Order accordingly.]

Legislation referred to:
Bankruptcy Rules 1969, rr. 49(1), (2), (3), 91, 117, 276
Penal Code, ss. 191, 199
Rules of the High Court 1980, O. 14 r. 1(1)

For the judgment creditor - Lee Hai Fong; M/s. Lee & Thong
For the petitioner/judgment debtor - Sugumar Balakrishnan; M/s. Sugumar & Co.

JUDGMENT

Syed Ahmad Idid JC:

On 31 October 1989 a bankruptcy notice under r. 91 of the Bankruptcy Rules 1969 was issued to Tan Chung Kat (T/A Hong Yeng Agricultural), Mile 8, Tuaran Road, Menggatal, Kota Kinabalu. The application for issue of the bankruptcy notice was accompanied with an office

copy of the final judgment against Tan Chung Kat obtained by Continental Traders (Sabah) Sdn. Bhd. for the sum of RM30,497.30. The judgment under O. 14 r. 1(1) was dated 27 May 1985.

An affidavit of service was sworn by Donny Toyoho, confirming that on 18 December 1989 he personally served a copy of the bankruptcy notice dated 31 October 1989 on the "abovenamed judgment debtor" (that is, Tan Chung Kat) at the office of Messrs. Lee & Thong. Donny Toyoho is a clerk in the employ of Messrs. Lee & Thong, solicitors for the judgment creditors (Continental Traders (Sabah) Sdn. Bhd.).

Creditors' petition (No. K. 362 of 1990) was presented to the Court on 24 May 1990. It was ordered that this be heard on 18 January 1991. The petition states that:

> the said Tan Chung Kat is justly and truly indebted ... in the sum of RM38,879.45 ... as amount due as at 31 October 1989 on a final judgment obtained ... on 27 May 1985 in Civil Suit No. 453 of 1981.

The affidavit of service (of the petition) was affirmed by Donny bin Toyoho on 12 January 1991 and filed on 14 January 1991 where he says that on 8 January 1991 at 6 p.m. he personally served the petition on Tan Chung Kat at Hong Dart Agriculture Sdn. Bhd., Mile 8, Jalan Tuaran, Menggatal.

(i) Just before the petition was to be heard, Messrs. Sugumar & Co. filed a notice by debtor of intention to oppose petition (r. 117 of the Bankruptcy Rules 1969) on 16 January 1991. Strangely, this is a notice by debtor ... but the notice stated that:

> I, Tan Pheng Kuah @ Tan Chong Ket, do hereby give you notice that I intend to oppose and dispute the irregular service of the bankruptcy petition herein on the following grounds:
>
> 1. that I am not the person named as the judgment debtor in the bankruptcy petition herein;
>
> 2. that I have had no dealings or transactions with the judgment creditors herein at any material time and I am totally unaware of the alleged debt purportedly due to the judgment creditors.

(ii) As quickly as Messrs. Sugumar's notice was filed, so was the response by Messrs. Lee & Thong who filed an affidavit sworn by Lim Leh Eng, a director of the plaintiff company.

(i) Miss. Lee Hai Fong of Counsel for judgment creditor, asked the Court, under its inherent jurisdiction, to allow Mr. Thong of Messrs. Lee & Thong to identify the judgment debtor. At the hearing, she said she did not have enough time to check earlier.

(ii) Mr. Sugumar did not know under what Bankruptcy Rules in the Act the Court can order his client to be produced for cross-examination. He submitted nevertheless that the Court has no jurisdiction to grant the application. Further, Mr. Sugumar cited r. 276 of the Bankruptcy Rules which provides that the Rules of the High Court would not apply to the proceedings in bankruptcy.

(i) To this Miss. Lee urged the Court to act under r. 49 of the Bankruptcy Rules 1969 which states:

> 49(1) The Court may in any matter make an order for the examination upon oath of any person at any place in the federation.
>
> (2) The examination may be ordered to take place before the Court, or an officer of the Court, as the Court may direct.

(3) The deposition shall be taken down in writing and, with the leave of the Court, may be used in evidence on such terms, if any, as the Court may direct.

(ii) The Court will not order an examination as it must always be the judgment creditors' responsibility to prove their claims beyond doubt.

This is an extraordinary case. Mr. Sugumar produced a photocopy of a certified copy of Sabah Department of National Registration's Form HNR 7 No: FA 135299 dated 7 May 1990 "in replacement of damaged NRIC." The name stated thereon is Tan Pheng Kuah @ Tan Chong Ket (note "O" instead of "U" in Chong and "E" in Ket and not "A" as was spelt in the bankruptcy notice and petition). The T/L (or tarikh lahir) or date of birth is given as 14 March 1946 which makes him 45 years old. Among the documents detained by the department, as evidenced by the HNR 7 is NRIC (?) (sic) one with number "H 6010660 (Biru)".

Mr. Sugumar's client, Tan Pheng Kuah @ Tan Chong Ket "admitted that he is the judgment debtor" (according to the affidavit of Donny bin Toyoho who swore that he "personally served on Tan Chung Kat on 8 January 1991 a copy of the creditors petition dated 10 May 1990)." This is baffling. Donny, however, added that "the said judgment debtor refused to acknowledge receipt" of the petition.

There are several unsavoury parts regarding this matter; the Tan Chung Kat, according to the affidavit of service of Donny Toyoho dated 22 December 1989, was "T/A Hong Yeng Agricultural". This was also the address given in the judgment granted under O. 14 r. 1(1) on 27 May 1985. See also the Exhibit "LLE.1". But Donny bin Toyoho, by his affidavit of service dated 15 January 1991, served the creditors petition at Hong Dart Agriculture Sdn. Bhd. There is no evidence that Hong Yeng Agricultural and Hong Dart Agriculture Sdn. Bhd. are one and the same or that they are at the same premises. The address given is "Mile 8" and this is a fairly long stretch of road for this Court to make a reckoning or zoning. We do not have any scientific instrument to locate the exact spot with precision.

Most important of all is that Mr. Sugumar's client who claims he is not the person named as the judgment debtor in the bankruptcy petition also claims that he had no dealings or transactions with the judgment creditor at any material time and that he is totally unaware of the alleged debt purportedly due to the judgment creditor.

Mr. Sugumar strenuously contended that there is "no iota of evidence to relate my client to to-day's proceedings". Also that bankruptcy action involves quasi-penal sanction and so before the official assignee can enforce the Court's order he must be certain the person so named is the proper person. If there had been an NRIC number anywhere and the number tallies or differs this could be of some evidential value to connect or disregard.

One other point is where Mr. Sugumar claimed that the signature of Tan Chung Kat at Exhibit "LLE.1" is different from the signature of his client in the notice dated 16 January 1991 which he filed, that is, of Tan Pheng Kuah @ Tan Chong Ket. I recall a case where a man's name and NRIC number appeared on loan documents but the signature differed. He claimed that he had never entered the bank which had obtained the orders to declare him a bankrupt. "Man who wanted passport gets 'bankrupt' shock" -The Star, Friday, 9 September 1988.

Under the circumstances, I rule that:

(i) as there is a notice that the petition served on 8 January 1991 was on a wrong party (and there is no sufficient evidence to reverse that), it can be re-served on the proper party wherever that party may be;

(ii) if in consequence of this notice by Mr. Sugumar's client it turns out that the client is indeed the true judgment debtor then police action be taken against him for giving false evidence. Section 199 of the Penal Code ("199. Whoever, in any declaration made or subscribed by him, which declaration any Court, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declarations made or used, shall be punished in the same manner as if he gave false evidence."

The Law of Crimes by Ratanlal & Dhirajlall (2nd Edn.,) comments.

Section 191 (of the Penal Code) deals with compulsory declarations; this section (s. 99) with false declaration made voluntarily, provided such declarations are capable of used as evidence.) may be relevant; and

(iii) based on the evidence so far adduced, there will be no order as to costs.

Also found at [1991] 2 CLJ 1599